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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

LINDA L. DOWNER, HUNT B. DOWNER, PATRICK B. LANDRY, DOROTHY A. LANDRY,

Petitioners,

v.

FRED SIEGEL, also known as MICHAEL SIEGEL, also known as MICHAEL FRED SIEGEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 10, 2007

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QUESTIONS PRESENTED

In *Buckeye Check Cashing, Inc. v. Cardegna*, this Court reaffirmed the holdings of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* and *Southland Corp. v. Keating*, expressly noting: "The parties have not requested, and we do not undertake, reconsideration of those holdings." Petitioners expressly make such a request, *viz.*:

1. Whether *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), should be overruled. Alternatively,

2. Whether the Fifth Circuit erred in applying *Prima Paint* to require arbitration of claims of fraud against a securities broker who in violation of NASD Rules 2110, 3040 and LRS 51:701-724 engaged in a private securities transaction for his personal benefit, independent of his brokerage company, and outside the brokerage agreement.

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PETITION FOR A WRIT OF CERTIORARI

The Fifth Circuit Court of Appeals' decision below is at odds with the Maine Supreme Court's decision in *Barrett v. McDonald Investments, Inc.*, 870 A.2d 146 (Me. 2005), and it is being used as a shield to protect a fraudulent party from litigation. Certiorari should be granted to consider the scope of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which allows fraudulent actors to manipulate the justice system to protect their own interests. Alternatively, this petition should be held until a decision is rendered in *Hall Street Associates v. Mattel, Inc.*, cert. granted in 2007.

OPINIONS BELOW

The June 13, 2007 opinion of the Fifth Circuit Court of Appeals, reported at 489 F.3d 623.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was rendered on June 13, 2007. Petitioner timely sought rehearing, which was denied on July 16, 2007. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background.

Petitioners Hunt and Linda Downer and Patrick and Dorothy Landry contracted with Dain Rauscher brokerage house in November of 1997. Fred Siegel, the broker for the petitioners herein, requested that he be allowed to use the petitioners' money to invest in an entity known as World Environmental Technologies (WET) under NASD Rule 346 which allows an investor to engage in "side dealing" that does not involve Dain Rauscher in any way. Mr. Siegel was explicitly told by Dain Rauscher that he could not effect transactions with WET or any company which may become involved with WET; and if any customer wished to invest in WET, it would need to be entered through another broker. Mr. Siegel violated both of the express provisions set forth by Dain Rauscher in response to his request to engage in "side dealings." In January of 1998 Siegel entered into a contract with WET in which he agreed to obtain for them $15,000,000.00 within the following two months and four days in exchange for cash, stock stipulated, and a position on the board of directors at WET. Mr. Siegel subsequently used $300,300.00 from the Downer's account at Dain Rauscher and $100,000.00 from the Landry's account to put toward a $1,250,000.00 down payment on the formula for WET. After this payment was made the corporation had $14,000.00 left in its account and was unable to pay the $57,000.00 monthly payments that were required to purchase the formula. Because of their inability to

pay, WET never materialized and all investments were lost. Consequently, Siegel was sanctioned by the NASD by having his license suspended for a year and being fined for participating in private sales of securities without notifying his member firm and making recommendations that were "unsuitable for any investor."

B. Procedural Background.

On May 15, 2002, having received no information from Mr. Siegel, the Downers filed suit in Terrebonne Parish under Docket No. 135,339, and supplemented same on June 20, 2002. The Downers claimed that the Subscription Agreement was induced on elements of fraud, including oral communications from Mr. Siegel in their home, which included statements of material facts, which turned out to be untrue. On July 30, 2002, the Landrys filed a similar suit in Terrebonne Parish. On June 5, 2002, Siegel removed the Downers suit to federal court, and the Landry's suit was removed shortly thereafter. The Downers and the Landrys petitioned the United States district court to remand back to state court, and included a motion to vacate the arbitration agreement. Then on September 19, 2002, the district court agreed that the Downers and the Landrys were subject to arbitration, denied their motions, and sent the matter to arbitration.

Subsequent to the arbitration decision, which was a denial of the claims based upon the running of

the statute of limitations, the parties petitioned the United States district court to vacate the arbitration decision, predicated on two grounds. The first was that the decision of the arbitrators as to the statute of limitations was legal error; the second, fraud and the violation of NASD rules by Mr. Siegel. The district court on July 19, 2005, vacated the arbitration decision.

The United States Court of Appeals for the Fifth Circuit followed *Prima Paint, supra,* and held that the district court erred in vacating the arbitration decision for fraud. The Fifth Circuit ordered the Downer's and the Landry's claims dismissed.

REASONS FOR GRANTING THE PETITION

I. As *Prima Paint* Stands, Arbitration Is Required Even Where One Party Engages In Private Securities Transactions Not Contemplated In The Original Brokerage Agreement And Is Thus Being Used As A Tool To Protect Those Engaging In Fraudulent Acts From Litigation. It Should Be Overruled.

Prima Paint holds that if there is no fraud in the inducement of the arbitration clause, it must be upheld even if the entire contract is vitiated by the

unconscionable fraudulent acts of one party.[1] Due to the broad sweeping scope of *Prima Paint*, it is being used as a tool to protect those people who intend to act in a fraudulent manner and thus have their clients sign an arbitration clause in order to shield them from the courts if and when they are exposed.

The arbitration agreement between the petitioners and Siegel reads, in pertinent part, as follows:

> (a) all controversies which may arise between the client and RPR, its officers, directors, agents, representatives or employees, present or former, concerning any account maintained by the client with RPR, any transaction involving RPR and the client, regardless of whether such transaction occurred in the choice account or another account, or the construction, performance or breach of this or any other agreement between the client and RPR, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law. Accordingly, both RPR and the client are waiving their respective rights to seek remedies in the court, including, among other things, the right to a jury trial.

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[1] Comment: *Prima Paint to First Options: The Supreme Court's Procrustean Approach To the Federal Arbitration Act and Fraud*, 38 Hous. L. Rev. 335 (2001).

True, the language of this agreement covers all controversies which may arise between the client and Dain Rauscher's employees. Mr. Siegel, however, was not acting as an employee of Dain Rauscher in his side dealings with the petitioners. He specifically asked to engage in this transaction by filing a Request to Engage in an Activity Governed by Rule 346, to engage in business from which Dain Rauscher would receive no benefit and have no liability if there were losses suffered. Dain Rauscher denied his request, but Siegel entered into the transactions in question in spite of Dain Rauscher's disapproval.

Why is it that the justice system would protect this wrongdoer by allowing him the advantage of arbitration when he is exploiting *Prima Paint* as a shield to further his own fraudulent dealings? No wrongdoer should profit from his own wrong. *Prima Paint* should not be read to shield fraudulent acts.[2]

II. There Is A Conflict Between The Maine Supreme Court And Judge King's Fifth Circuit Decision Over Whether *Prima Paint* Applies To The Circumstances Of This Case, A Conflict Which This Court Should Resolve By Granting Certiorari.

Under this Court's Rule 10(a), petitioners pray that a writ of certiorari be granted to resolve the

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[2] Comment: *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 Marq. L. Rev. 581 (2002).

dispute between the Maine Supreme Court in *Barrett v. McDonald Investments, Inc.*, 870 A.2d 146 (Me. 2005), and the decision made by Judge King of the Fifth Circuit, who chose to apply *Prima Paint* and the severability doctrine to these identical situations.

In *Barrett*, plaintiff signed a contract with an investment firm that required arbitration if any disputes arose. The arbitration agreement provides for the arbitration of "all controversies which may arise between McDonald and Barrett concerning any transaction or the construction, performance, or breach of this or any other agreement between them pertaining to securities and any other property." (*Id.* at 19). The Barrett's broker made many misrepresentations and false statements in the hope of persuading the Barretts to invest their life savings. The broker was successful and the Barrett's lost over half of their investment. The Maine Supreme Court noted:

> We must determine whether to follow out long-held principle that an ambiguity in a contract be construed against the drafter or to apply the principle that doubts should be resolved in favor of arbitrability. . . . We will not take a broad and expansive view of the arbitration clause in these circumstances to encompass claims that are unrelated to the substance of the agreement.

(*Id.* at 20-21). The Main Supreme Court joined other courts "that have favored interpreting ambiguous arbitration clauses against the drafter" forcing them to bear the risk if the language is ambiguous. *See,*

e.g., *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 641 (Fla. 1999); *Victoria v. Superior Court*, 40 Cal.3d 734, 222 (1985).

The Maine Supreme Court did not apply *Prima Paint* and construed the agreement against its drafter, a long-held principle in U.S. contract law.

The decision of the Maine Supreme Court in *Barrett* conflicts with the Fifth Circuit's decision where Judge King recites, "The presumption of arbitrability dictates that the court find in favor of arbitration because there is *an* interpretation of the clause which covers the claims in this case." *Downer v. Siegel*, 489 F.3d 623 (2007) (emphasis added). Judge King quotes *Wick v. Atl. Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979), explaining that "arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue."

The conflict arises between these two courts where tradition tells the decision maker or judge to place the loss on the party that drafted the contract and new law tells them that although the arbitration clause may be ambiguous, if there is any way it may be construed to cover the situation it must be interpreted in that manner. This dispute must be resolved.

III. This Court Granted Certiorari In *Hall Street Associates v. Mattel, Inc.*, Cert. Granted In 2007, Where The Ninth Circuit Ruled That Parties May Not Contract Out Of The FAA's Standard Of Review. If This Court Reverses, Whether One Can Opt Out Of An Arbitration Agreement By One's Conduct In Acting Outside The Scope Of The Original Contract, Is The Alternative Question Presented Here.

If the Court holds that parties are free to limit arbitrations agreements, the issue arises in the present case whether a party can opt out of an arbitration clause by his wrongful conduct.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-30159

LINDA L DOWNER;
HUNT B DOWNER

Plaintiffs-Appellees

v.

FRED SIEGEL, Etc; ET AL

Defendants

FRED SIEGEL, also known as
Michael Siegel, also known as
Michael Fred Siegel

Defendant-Appellant

PATRICK B LANDRY;
DOROTHY A LANDRY;
LINDA L DOWNER;

Plaintiffs-Appellees

v.

MICHAEL F SIEGEL, Etc;
ET AL

Defendants

MICHAEL F SIEGEL, also
known as Fred Siegel

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed June 13, 2007)

Before KING, WIENER, and OWEN, Circuit Judges.

KING, Circuit Judge:

Defendant-appellant Michael F. Siegel appeals the district court's order vacating an arbitration award in his favor. We REVERSE and REMAND for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dain Rauscher, Inc. ("DR") employed defendant-appellant Michael F. Siegel (also known as Fred Siegel) as a stock broker. In 1997, plaintiffs-appellees Linda and Hunt Downer (together, "the Downers") opened a brokerage account with DR and executed an asset management agreement which stated "[t]he client understands, acknowledges and agrees that:

> (a) ALL CONTROVERSIES WHICH MAY ARISE BETWEEN THE CLIENT AND [RAUSCHER PIERCE REFSNES ("RPR")],[1] ITS OFFICERS, DIRECTORS, AGENTS,

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[1] Dain Rauscher, Inc. ("DR") is the successor-in-interest to Rauscher Pierce Refsnes ("RPR").

> REPRESENTATIVES OR EMPLOYEES, PRESENT OR FORMER, CONCERNING ANY ACCOUNT MAINTAINED BY THE CLIENT WITH RPR, ANY TRANSACTION INVOLVING RPR AND THE CLIENT, REGARDLESS OF WHETHER SUCH TRANSACTION OCCURRED IN THE CHOICE ACCOUNT OR ANOTHER ACCOUNT, OR THE CONSTRUCTION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN THE CLIENT AND RPR, WHETHER ENTERED INTO PRIOR, ON, OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION TO THE FULL EXTENT PROVIDED BY LAW. ACCORDINGLY, BOTH RPR AND THE CLIENT ARE WAIVING THEIR RESPECTIVE RIGHTS TO SEEK REMEDIES IN COURT, INCLUDING, AMONG OTHER THINGS, THE RIGHT TO A JURY TRIAL.

Plaintiffs-appellees Patrick and Dorothy Landry (collectively, "the Landrys") signed an asset management agreement with an identical arbitration clause when they opened a brokerage account with DR in early 1998. Siegel, as an agent of DR, served as a stock broker for the Landrys and the Downers (collectively, "the plaintiffs").

In November 1997, the Downers transferred $300,000 from their DR account directly to an account of World Environmental Technologie [sic] ("WET"), allegedly at Siegel's suggestion. The Landrys also

allege that they were persuaded by Siegel to invest $100,000 from their DR account in WET.

In 2002, unhappy with the failure of their WET investments, the Landrys and the Downers filed separate actions in Louisiana state court against multiple defendants including Siegel[2] alleging, among other things, fraud in the inducement of both the investments and account agreements and violations of the Securities Exchange Act of 1934 and NASDAQ rules of conduct. The defendants removed the actions to federal court. These cases were later consolidated. The plaintiffs filed additional related suits in state court, which were removed and consolidated with the lead case.

The defendants moved to stay the actions pending arbitration, but the Downers contested the arbitrability of the dispute. The district court stayed the actions pending arbitration and denied the Downers' motion concerning arbitrability. Throughout the next two years, the plaintiffs attempted numerous times, albeit unsuccessfully, to have the arbitration panel dismiss the arbitration proceeding and to otherwise have the district court lift its stay and return the case to the active docket.

Siegel initiated an arbitration, seeking a declaratory judgment that he was not liable to the plaintiffs. The plaintiffs filed a counterclaim against Siegel in

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[2] Siegel is the only defendant involved in this appeal.

the arbitration alleging the same misconduct and requesting the same relief as they had in the district court action. The arbitration panel ultimately dismissed the plaintiffs' claims based on prescription.

On the plaintiffs' motion, the district court vacated the arbitration award, holding that (1) because the investments in WET were private investments between Siegel and the plaintiffs, they were not subject to the arbitration agreement and (2) given the repeated challenges to the arbitrability of the disputes at issue, the plaintiffs had not waived their right to challenge the arbitration. Siegel, who filed a motion to confirm the arbitration award, now appeals.

II. DISCUSSION

We review the district court's decision to vacate an arbitration award under a de novo standard, deferring greatly to the arbitration panel's decision. *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004). Pursuant to the Federal Arbitration Act ("FAA"), a district court's ability to set aside an arbitration award is limited to four grounds. 9 U.S.C. § 10(a). Only one of those grounds is applicable in this case, that is, whether the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

"'[A] district court's review of an arbitration award is extraordinarily narrow.'" *Kergosien*, 390

F.3d at 352 (quoting *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 393 (5th Cir. 2003)) (brackets in original). A presumption of arbitrability exists which requires the court to decide in favor of arbitration when "the scope of an arbitration clause is fairly debatable or reasonably in doubt." *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985). "The weight of this presumption is heavy: arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.'" *Id.* at 636 (quoting *Wick v. Atl. Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979)).

A reasonable interpretation of the arbitration clause in the instant case supports a conclusion that the clause covers the dispute. Although the district court held that the plaintiffs' dispute is with Siegel in his individual capacity and is not subject to the arbitration clause in the agreement between the plaintiffs and DR, "[w]hether a claim is subject to arbitration depends on the contractual language." *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 513 (7th Cir. 2003). The text of the clause in the instant case does not limit the circumstances to which it applies to those that fall within the scope of the employee's employment. Rather, the arbitration clause provides:

> ALL CONTROVERSIES WHICH MAY ARISE BETWEEN THE CLIENT AND RPR, ITS OFFICERS, DIRECTORS, AGENTS, REPRESENTATIVES OR EMPLOYEES,

PRESENT OR FORMER, CONCERNING ANY ACCOUNT MAINTAINED BY THE CLIENT WITH RPR ... SHALL BE DETERMINED BY ARBITRATION.

The broad language of this clause covers all controversies between the plaintiffs and former or current employees of DR concerning any account the plaintiffs maintained at DR. Here, because the WET investments were made from funds deposited in the plaintiffs' DR accounts, one reasonable interpretation of the clause is that these claims concerned the Downers' and the Landrys' accounts. The plaintiffs cannot maintain their underlying action without discussing the asset management agreement and why Siegel was in charge of their money. The presumption of arbitrability dictates that the court find in favor of arbitration because there is an interpretation of the clause which covers the claims in this case. That there are other interpretations which could lead to a conclusion that the claims involve a private investment outside the scope of the arbitration clause does not require vacation of the arbitration award. "[I]f there is ambiguity as to whether an arbitrator is acting within the scope of his authority, that ambiguity must be resolved in favor of the arbitrator." *Am. Eagle Airlines, Inc. v. Airline Pilots Ass'n,* 343 F.3d 401, 405 (5th Cir. 2003). Accordingly, the arbitration panel did not exceed its powers, and the district court improperly vacated the arbitration award.

Our conclusion is consistent with decisions of other circuits that have found other fraud claims to

be arbitrable under similar arbitration agreements. For example, in *Fazio v. Lehman Brothers, Inc.*, the plaintiffs' broker had misappropriated at least $54 million of his clients' money. 340 F.3d 386, 391 (6th Cir. 2003). The plaintiffs sued the brokerage firms for which their broker had worked over the course of his career, and the defendants moved to stay the proceedings and compel arbitration based on an arbitration clause materially similar to the one involved here.[3] *Id.* at 391-92. The Sixth Circuit, disagreeing with the district court's determination that the claims were outside the scope of the arbitration agreements, held that the claims concerning the broker's fraudulent conduct were within the scope of the arbitration agreement because "[t]he lawsuit by necessity must describe why [the broker] was in control of the plaintiffs' money. . . . The plaintiffs therefore cannot maintain their action without reference to the account agreements, and accordingly, this action is covered by the arbitration clauses." *Fazio* F.3d at 395. On another claim for fraudulent acts by the same broker involving the same arbitration provision as in *Fazio*, the Seventh Circuit agreed that the "claims clearly fell within the scope of this arbitration clause because they all related to [the plaintiff's] 'accounts, transactions or

[3] The arbitration clause at issue in *Fazio v. Lehman Brothers, Inc.*, provided that "[a]ny controversy arising out of or relating to any of my accounts, to transactions with you for me, or to this or any other agreement or the construction, performance or breach thereof, shall be settled by arbitration." 340 F.3d 386, 392 (6th Cir. 2003).

agreements.'" *Deputy v. Lehman Bros. Inc.*, 345 F.3d at 513 (quoting *Fazio,* 340 F.3d 494, 513 (7th Cir. 2003).

The plaintiffs assert that the contract should be invalidated because of the alleged fraudulent inducement, in essence arguing that there was never a binding contract because they would not have entered into the transaction if they had not been misled by Siegel. This argument is beside the point. Even if this contract had been induced by fraud, the arbitration clause is enforceable unless the plaintiffs were fraudulently induced into agreeing to the arbitration clause itself.[4] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04 (1967). The district court cannot consider general claims of fraud in the inducement of the contract. *Id.* The plaintiffs' fraud argument focuses on the nature of the WET investment. At no point do the plaintiffs' fraudulent inducement claims focus on the arbitration clause itself. Accordingly, the plaintiffs' argument that the contract

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[4] In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* the Supreme Court stated that:

> [I]f the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the "making" of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the [Federal Arbitration Act's] statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

388 U.S. 395, 403-04 (1967).

should be vitiated on fraudulent inducement grounds also fails.[5]

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED, and this case is REMANDED for confirmation of the arbitration award.

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[5] Siegel also argues that the plaintiffs waived their right to contest the arbitrability of the claims. We decline to reach the waiver issue because even if, as the plaintiffs argue, they did not waive that objection, the claims are subject to the arbitration clause.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LINDA L. DOWNER and HUNT B. DOWNER ET AL	CIVIL ACTION
versus	No. 02-1706 C/W 02-2399 C/W 02-2733 C/W 04-3380
FRED SIEGEL, THE SIEGEL GROUP, INC., DAIN RAUSCHER, INC., ET AL	SECTION: E/1

ORDER AND REASONS

(Filed Jul. 14, 2005)

This matter is before the Court on plaintiffs' (collectively "the Downers") Motion to Vacate the Award of the NASD Arbitration Panel.[1] Doc. #91, C.A. 02-1706. Defendants opposed the motion and filed a Motion to Confirm the Arbitration Award. Doc. #94, C.A. 02-1706. The matters were submitted on the briefs.

BACKGROUND

The underlying dispute arose from two separate financial transactions, one in December 1997 and one in February 1998, that the Downers and the Landrys entered into allegedly on the advice of Michael F. Siegel ("Siegel").[2] Siegel was purportedly acting in his

[1] *Michael F. Siegel v. Hunt and Linda Downer, et al.*, NASD-DR 02-06279.

[2] "Allegedly on Siegel's recommendation, the Downers and the Landrys purchased stock and debentures offered by a soon to

(Continued on following page)

capacity as an agent and representative of Dain Rauscher, Inc. ("Dain Rauscher"), at that time. Unhappy with the outcome of those transactions, the Downers initially brought suit against the defendants in state court in 2002. The suit was removed to federal court by Dain Rauscher pursuant to federal question jurisdiction, 28 U.S.C. § 1331.[3]

On September 19, 2002, pursuant to Dain Rauscher's motion invoking an arbitration clause in agreements between the Downers and the Landrys and Dain Rauscher, and in accordance with the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (providing that a written arbitration clause in a contract involving commerce "shall be valid, irrevocable, and enforceable"), this Court stayed the actions in the district court and referred the disputes to arbitration. Doc. #42, C.A. 02-1706. Over the next two years, the Downers were unsuccessful in several attempts to have the NASD Arbitration Panel dismiss the arbitration proceeding[4] and to otherwise have the

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be defunct company called World Environmental Technologies ("World ET"). Altogether, they lost $400,300.00 on the transactions.

[3] The Downers and Landrys subsequently filed two additional related suits in state court, which were both removed and consolidated with the lead case, and another suit in federal court, C.A. 02-2224, which the Downers voluntarily dismissed.

[4] During the NASD arbitration process, the plaintiffs herein (the Respondents in the arbitration proceeding) filed their First Motion to Dismiss on March 11, 2003 and a "Motion to Stay Arbitration Until the Complaint Filed by the Department of Enforcement on NASD Against Michael F. Siegel is Concluded"

(Continued on following page)

district court lift its stay and return the matter to its active docket.[5] In each case, the Downers argued that the dispute at issue was not arbitrable.

On October 18, 2002, Siegel initiated an arbitration as "Claimant" against the Downers as "Respondents".[6] *Michael F. Siegel v. Hunt and Linda Downer, et al.,* NASD-DR 02-06279. Siegel sought a judgment that he was not liable to the Downers for the losses they sustained or, alternatively that their claims brought in Louisiana state and federal court are

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on March 13, 2003. See AWARD, Arbitration No. 02-06279, Case Information. The panel denied both motions on April 1, 2003. Respondents filed a Second Motion to Dismiss and/or Remand to Federal Court for Clarification on June 3, 2003. On July 21, 2003, Respondents filed a "Supplemental Motion in Support of the Pending Motion to Dismiss and Grant a Judgment in Favor of the Downers and Landrys. . . . " The motion(s) were denied on November 21, 2003. Respondents filed a Motion for Reconsideration and/or Rehearing on January 12, 2004, which was denied on February 2, 2004.

[5] On September 30, 2002, the Downers filed a motion to reconsider the referral to arbitration (doc. #43). The motion was denied (doc. #45). On October 22, 2002, they appealed the decision to the Fifth Circuit (doc. #46), but the appeal was dismissed on May 13, 2003 (doc. #62). On March 19, 2003, they filed a motion to reopen and remand the case (doc. #57), which was denied on May 28, 2003 (doc. #63). On June 2, 2003, the Downers filed a motion to reconsider the denial (doc. #64), which the Court denied on June 25, 2003 (doc. #70). On October 30, 2003, they filed a motion to have the matter restored to the trial docket (doc. #74), which was denied on December 10, 2003 (doc. #83).

[6] Dain Rauscher was never a party to the arbitration proceeding at issue here.

barred because: the investments were suitable; Siegel made no misrepresentations to them; they made the decision to invest; their claims fail to state a cause of action under state and federal securities laws; prescription; and failure to mitigate. *See* Award – NASD-DR No. 02-06279, CASE SUMMARY. The Downers counterclaimed asserting breach of fiduciary duty and misrepresentations in connection with the purchase of WET stock and debentures, requesting $400,300.00 in compensatory damages. *Id.*

The arbitration hearing in Siegel's NASD-Dispute Resolution Case was held over the entire week of April 12, 2004, and considerable documentary evidence was presented, as well as live testimony of the claimant and all respondents, among others. Ultimately, the NASD Arbitration Panel reached its decision and entered its Arbitration Order on November 15, 2004. Without reaching the merits of the claims, the Arbitration Panel dismissed the Downers' counterclaim with prejudice based on prescription. Respondents' two motions for reconsideration or a new trial were denied.

On December 13, 2004, the Downers filed yet another lawsuit in federal court, styled "Complaint to Reverse, Modify, Declare Illegal and/or Grant Damages to Plaintiffs from an Arbitration Decision that is Contrary to Law and Fact." C.A. No. 04-3380. The lawsuit was transferred to this section and consolidated with

the previously stayed actions.[7] Doc. #84, C.A. 02-1706. In that lawsuit, the Downers ask that the Arbitration Order be "set aside, vacated and annulled", and as damages, that they receive a "return on their investment". Complaint, ¶ 32. On January 12, 2005, the Downers filed a "Motion to Vacate Ruling of Arbitration Panel" which alleged numerous errors of fact and law by the Arbitration Panel. Doc. #3, C.A. 04-3380. The hearing date previously set on the Motion to Vacate was cancelled upon consolidation of the case. Doc. #9, C.A. 04-3380.

Subsequently, the Downers filed a motion entitled "Motion to Dismiss Dain Rauscher, Inc., and to Delete Certain Allegations against Michael F. "Fred" Siegel, and to Limit the Captioned Matter to the Arbitration Agreement". Doc. #87. That motion sought to delete all allegations against Siegel "that deal with errors of law", and to modify the pleadings in the captioned matter to limit the claim to their allegation in ¶ 21 of their complaint that, insofar as the transactions at issue, Siegel is not entitled to the benefits of arbitration. The motion was granted, and the previously filed Motion to Vacate was reset for submission on June 8, 2005. Doc. #92. Judgment was entered dismissing Dain Rauscher from the case. Doc. #90.

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[7] The Court construed Civil Action 04-3380 to be, at the very least, a motion to lift the stay and reopen the pending actions pursuant to the Court's order of September 19, 2002.

In essence, the Downers abandoned their demand that the Court vacate the Arbitration Panel decision as contrary to law and fact, and argue, as they have repeatedly argued since the matter was referred to arbitration by this Court, that Siegel was acting outside of his capacity as an agent of Dain Rauscher when the disputed transactions occurred, and their dispute with Siegel is not within the scope of the arbitration agreement between Dain Rauscher and the Downers.

Siegel argues that the Downers' argument fails for three reasons: (1) the Downers have not overcome the strong presumption in favor of arbitration when the scope of an arbitration clause is at issue as it is here; (2) the NASD Panel and this Court repeatedly determined that the disputes as presented by the Downers were subject to arbitration pursuant to the Agreement between the Downers' and Dain Rauscher; and (3) the Downers waived any objection to the arbitrability of the disputes during the arbitration itself.

ANALYSIS

"When an arbitration award is at issue, the district court does not sit as an appellate court or a court of review, to decide the merits of the grievance or the correctness of the award." *United Steelworkers of Am., AFL-CIO v. Mueller Brass Co.*, 479 F.Supp. 413, 316 (N.D.Miss 1979). Pursuant to the FAA, review of an arbitration award is limited to four

grounds, only one of which is applicable here. A district court may vacate an arbitration award "where the arbitrators have exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made." *Berk-Cohen Associates, L.L.C. v. Orkin Exterminating Co.,* 264 F.Supp.2d 448, 451 (E.D.La. 2003, Fallon, J.). Moreover, when the scope of an arbitration clause is "reasonably in doubt", the court should decide the issue in favor of arbitration. *Mar-Len of La., Inc. v. Parsons-Gilbane,* 773 F.2d 633, 635 (5th Cir. 1985) *citing United Steelworkers of Am. v. Warrior & Gulf Navigational Co.,* 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

The Downers do not dispute the strong presumption in favor of arbitration when the scope of an arbitration clause is in dispute. They have limited their challenge to the arbitrability of the dispute, that is, questioning whether the arbitrators should have heard the dispute at all. "The question of arbitrability is determined on the basis of the existence of an arbitration clause that on its face appears broad enough to encompass the parties' claims." *Mar-Len of La.,* at *id.*

The arbitration clause at issue is quite broad, as follows in pertinent part:

> ALL CONTROVERSIES WHICH MAY ARISE BETWEEN THE CLIENT AND RPR, ITS OFFICERS, DIRECTORS, AGENTS, REPRESENTATIVES OR EMPLOYEES, PRESENT OR FORMER, CONCERNING

> ANY ACCOUNT MAINTAINED BY THE CLIENT WITH RPR, ANY TRANSACTION INVOLVING RPR AND THE CLIENT, REGARDLESS OF WHETHER SUCH TRANSACTION OCCURRED IN THE CHOICE ACCOUNT OR ANOTHER ACCOUNT, OR THE CONSTRUCTION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN THE CLIENT AND RPR, WHETHER ENTERED INTO PRIOR, ON, OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION TO THE FULL EXTENT PROVIDED BY LAW. ACCORDINGLY, BOTH RPR AND THE CLIENT ARE WAIVING THEIR RESPECTIVE RIGHTS TO SEEK REMEDIES IN COURT, INCLUDING AMONG OTHER THINGS, THE RIGHT TO A JURY TRIAL.

Indeed, this Court previously concluded, on several occasions, that the dispute at issue was arbitrable. On those occasions, the Court considered that, for the transactions at issue, Siegel was acting in his capacity as an agent of Dain Rauscher (the successor of RPR) and therefore the transactions involved Dain Rauscher and its clients, the Downers. Accordingly, the Court concluded that Siegel was a third party beneficiary entitled to the benefits of the arbitration clause. See *Arnold v. The Arnold Corp. – Printed Communications for Business,* 920 F.2d 1269, 1281-82 (6th Cir. 1990) (reasoning that if the scope of the persons covered by an arbitration agreement could not be expanded to include agents of the parties to

the agreement, then plaintiffs could avoid arbitration with a business entity by simply suing its agents through whom the business acts.)

In their motion to dismiss Dain Rauscher and delete certain allegations against Siegel, and to limit the motion to vacate the arbitration award to the issue of the arbitrability of the dispute (doc. #87), the Downers argue that at the hearing before the arbitration panel in April, 2004, on rebuttal testimony, Siegel testified that regarding the transactions are at issue here, he had violated NASD Rule 3040, prohibiting "selling away". "Under Rule 3040, an associated person may not '*participate in any manner* in a private securities transaction without prior detailed written notice to his firm (emphasis added)." NASD DP No. C05020055, HEARING PANEL DECISION at p. 6. Selling away is a private security transaction where the brokerage company has no right or opportunity to supervise and the broker is conducting a private transaction for his personal benefit, independently of his brokerage company. The Downers did not provide the Court with documentary evidence of this purported testimony. However, the Court may, and does, take judicial notice of the decision in NASD DP No. C05020055. On April 19, 2004, in a seventeen page decision, the Hearing Panel held that Siegel violated NASD Rules 2110 and 3040 by selling securities outside his firm (Dain Rauscher) without giving the firm the required prior notice (known as "selling

away")[8]. *See* D.P. No. C05020055, HEARING PANEL DECISION, p. 17.

The Court concludes that the disputed transactions at issue were private transactions between the Downers and Siegel, and the Landrys and Siegel, and as such are not subject to arbitration pursuant to the arbitration agreement between the Downers and Dain Rauscher and the Landrys and Dain Rauscher.

Finally, Siegel argues that the Downers waived any objection to the arbitrability of the disputes during the arbitration hearing. Regarding this third argument, the Downers argue that "[t]his is not a correct statement" because "in the arbitration proceeding itself, after the defendant admitted violating NASD Rule 3040, the contract [containing the arbitration agreement] did not apply." See Downers' Rebuttal to Defendant's Opposition to their Motion to Vacate, p. 1.

"Waiver is the intentional relinquishment or abandonment of a known right." *U.S. v. LeBlanc,* 119 Fed. Appx. 654, 656, 2005 WL 66055, *1 (5th Cir. 2005), citing *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). It is true that the Downers' counsel, on the last [next] day of the hearing, withdrew yet another motion to dismiss

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[8] At page 7, the Hearing Panel Decision states as follows:

> Respondent concedes his violation of Rule 3040 (Tr. 78; Br., pp.8, 28). The record abundantly supports that concession.

the arbitration and stated that he was "prepared to accept arbitration." However, given the repeated challenges to the arbitrability of the disputes at issue, before and during the pendency of the arbitration proceeding, both in the district court and in the NASD arbitration proceeding, the Court cannot conclude that the Downers intentionally abandoned their challenge to the arbitration proceeding on the last day, after Siegel's admission that he was acting outside of his capacity as an agent of Dain Rauscher when he participated in the transactions in dispute.

For the reasons discussed herein, Siegel's Motion to Confirm the Arbitration Award must be denied. Finally, Siegel asks for an award of his legal fees associated with responding to the Downers' complaint/motion to vacate the Arbitration Panel's decision as a sanction for their "redundant case filings and duplicative motion practice" in general, and in particular for the "frivolous" complaint/motion at issue here. Considering the Court's conclusion that the matter at issue is not subject to arbitration, the motion is denied.

As a final matter, federal courts have a continuing obligation to examine the basis for their jurisdiction, and may raise the issue sua sponte, at any time. *MGC, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990). This matter was removed to the federal district court from the 32nd Judicial District Court for the Parish of Terrebonne. The removing defendants alleged exclusive federal jurisdiction pursuant to 28 U.S.C. § 1331 because the

action arose under §10(b) of the Securities Exchange Act of 1934, and supplemental jurisdiction over the state law causes of action pursuant to 28 U.S.C. §1367(a). On March 34, 2005, judgment was entered dismissing RBC Dain Rauscher, Inc., d/b/a/ Dain Rauscher, Inc., from this lawsuit. No federal claims remain. The Court therefore exercises its discretion pursuant to 28 U.S.C. §§ 1441(c) and 1447(c), and remands the removed actions to the 32nd Judicial District Court for the Parish of Terrebonne.

CONCLUSION

Accordingly,

(1) the Downers' motion to vacate the ruling of the Arbitration Panel (doc. #91, C.A. 02-1706) is **GRANTED**; and

(2) the defendant's motion to confirm the arbitration award and for costs and attorney's fees (doc. #94, C.A. 02-1706) is **DENIED**; and,

IT IS ORDERED that the AWARD in *Michael F. Siegel v. Hunt and Linda Downer, et al.,* NASD-DR 02-06279, **BE AND IS HEREBY VACATED**; and,

IT IS FURTHER ORDERED that C.A. 02-1706, 02-2399 and 02-2733 **BE AND ARE HEREBY REMANDED** to the 32nd Judicial District Court for the Parish of Terrebonne; and,

IT IS FURTHER ORDERED that C.A. 04-3380 be CLOSED.

New Orleans, Louisiana, July 14, 2005.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LINDA L. DOWNER and HUNT B. DOWNER ET AL	CIVIL ACTION
versus	No. 02-1706 C/W 02-2399 C/W 02-2733 C/W 04-3380
FRED SIEGEL, THE SIEGEL GROUP, INC., DAIN RAUSCHER, INC., ET AL	SECTION: E/1

JUDGMENT

Considering the Judgment of the United States Court of Appeals for the Fifth Circuit filed on June 13, 2007, and entered as a Mandate on July 24, 2007;

IT IS ORDERED, ADJUDGED, AND DECREED that the district court's Order, filed July 7, 2005, at record document #98, denying defendants/consolidated defendants/appellants Fred Siegel, also known as Michael Fred Siegel and Siegel Group, Inc.'s Motion to Confirm the Arbitration Award in NASD Dispute Resolution Case No. 02-06279, and granting plaintiffs' Motion to Vacate the Arbitration Award **BE AND IS HEREBY VACATED;** and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Arbitration Award in NASD Dispute Resolution Case No. 02-06279, dismissing plaintiffs' claims against defendants/consolidated defendants/appellants Fred Siegel, also known as Michael Fred Siegel and Siegel Group, Inc., based on prescription **BE AND IS HEREBY**

CONFIRMED, and that plaintiffs' claims against these defendants are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, August 2, 2007.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR
United States District Judge

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL F. SIEGEL, (CRD No. 1001893) [Home Address Omitted In Printing] Respondent.	Disciplinary Proceeding No. C05020055 Hearing Officer – JN **HEARING PANEL DECISION** April 19, 2004

Respondent violated Rules 2110 and 3040 by selling securities outside his firm without giving the firm the required prior notice. He also violated Rules 2110 and 2310 by recommending the purchase of securities that were unsuitable for any investor. For selling away, he was suspended for six months and fined $20,000. For the unsuitable recommendations, he was suspended for six months and fined $10,000. The suspensions for the two offenses are to be served concurrently. He was also assessed hearing costs of $6,607.15.

Appearances

For the Complainant: Mark P. Dauer, Esq. and Joel R. Beck, Esq. (Rory C. Flynn, Esq., of counsel.)

For the Respondent: George C. Freeman, III, Esq. and Meredith A. Cunningham, Esq.

DECISION

I. Introduction

On November 26, 2002, the Department of Enforcement filed a Complaint against Respondent Michael F. Siegel, alleging that he made unsuitable recommendations to two couples (H.D. and L.D., and P.L. and D.L.), in violation of NASD Rules 2110 and 2310, and that he

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-30159

LINDA L DOWNER; HUNT B DOWNER,

Plaintiffs-Appellees

v.

FRED SIEGEL, Etc; ET AL

Defendants

FRED SIEGEL, also known as Michael Siegel, also known as Michael Fred Siegel

Defendant-Appellant

PATRICK B LANDRY; DOROTHY A LANDRY; LINDA L DOWNER; HUNT B DOWNER

Plaintiffs-Appellees

v.

MICHAEL F SIEGEL, Etc; ET AL

Defendants

MICHAEL F SIEGEL, also known as Fred Siegel

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Jul. 16, 2007)

Before KING, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

Part III. Jurisdiction on Writ of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

* * *

BEFORE THE NATIONAL
ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Michael F. Siegel Beverly Hills, CA, Respondent.	DECISION Complaint No. C05020055 Dated: May 11, 2007

Registered representative participated in private sales of securities without notifying his member firm and made unsuitable recommendations to his four clients. *Held*, Hearing Panel's findings affirmed; fines affirmed; suspensions affirmed in part, modified in part. Hearing Panel's decision not to award restitution reversed; proceedings referred in part to a Subcommittee of the National Adjudicatory Council to calculate a specific restitution amount.

Appearances

For the Complainant: Mark P. Dauer, Esq., Joel R. Beck, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: George C Freeman, III, Esq., Meredith A. Cunningham, Esq., Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.

Decision

Pursuant to Procedural Rule 9311, respondent Michael F. Siegel ("Siegel") appeals an April 19, 2004 Hearing Panel decision, as supplemented by the Hearing Panel's March 16, 2006 supplemental findings of fact. The Department of Enforcement ("Enforcement") cross-appeals. The Hearing Panel found that Siegel, between November 1997 and February 1998, engaged in private securities transactions without providing his firm with prior written notice and made unsuitable recommendations to four clients. For the selling away violations, the Hearing Panel suspended Siegel for six months and fined him $20,000. For making unsuitable recommendations, the Hearing Panel suspended Siegel for six months, and fined him $10,000. The Hearing Panel ordered the suspensions to be served concurrently and assessed Siegel costs of $6,607.15.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LINDA L. DOWNER and HUNT B. DOWNER,	*	CIVIL ACTION
	*	NO.
Plaintiffs,	*	SECTION " " ( )
VERSUS	*	JUDGE
	*	MAGISTRATE JUDGE
FRED SIEGEL, THE SIEGEL GROUP, INC., DAIN RAUSCHER, INC., and DAIN RAUSCHER, INC.	*	
	*	
Defendants.	*	
* * * * * * * * * *		

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1441, defendants Fred Siegel, The Siegel Group, Inc., and Dain Rauscher, Inc. (named twice in plaintiffs' Petition for Damages) (collectively, "the defendants") give notice that Civil Action No.. 135339-C, *Linda L. Downer; et al. v. Fred Seigel, et al.*, is hereby removed to the United States District Court for the Eastern District of Louisiana from the 32nd Judicial District Court in the Parish of Terrebonne, Louisiana.

STATEMENT OF GROUNDS FOR REMOVAL

1. The defendants base this Notice of Removal on 28 U.S.C. § 1441 and 28 U.S.C. § 1331 because the action arises under the laws of the United States,

§ 10(b) of the the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder. The district courts of the United States have exclusive jurisdiction over actions brought under the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78aa. Under 28 U.S.C. § 1441(e), this Court is not precluded from hearing and determining this claim because the State court did not have jurisdiction over that claim.

2. The claims asserted in the Petition that are not federal claims or do not raise issues of federal law are so related to the claims giving rise to this Court's subject-matter jurisdiction that they form part of the same case or controversy. Accordingly, this Court has supplemental jurisdiction over any such claims pursuant to 28 U.S.C. § 1367(a).

3. The United States District Court for the Eastern District of Louisiana is the federal judicial district embracing the 32nd Judicial District Court, Terrebonne Parish, Louisiana, where the suit was originally filed.

4. This Notice of Removal is being filed within 30 days of the defendants' receipt of the plaintiffs' Petition for Damages and is therefore timely.

CONSENT OF CO-DEFENDANTS

5. All defendants join in this Notice of Removal.

PROCEDURAL REQUIREMENTS

6. A copy of all process, pleadings, and Orders served upon the defendants is filed with this Notice.

7. The defendants will give written notice of the filing of this Notice as required by 28 U.S.C. § 1446(d).

8. A copy of this Notice will be filed with the Clerk of the 32nd Judicial District Court for the Parish of Terrebonne as required by 28 U.S.C. § 1446(d).

WHEREFORE, defendants Fred Siegel, The Siegel Group, Inc., and Dain Rauscher, Inc. request that this action proceed in this Court as an action properly removed to it.

Respectfully Submitted,

/s/ Meredith A. Cunningham
George C. Freeman, III, 14272 (T.A.)
Meredith A. Cunningham, 26465
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